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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUN LOUNGE TANNING CENTERS, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent,	D043632 (San Diego County Super. Ct. No. GIC806302)
VANESSA T., Real Party in Interest.	

Proceedings in mandate after superior court denied summary judgment. Superior Court of San Diego County, William C. Pate, Judge. Petition granted.

I.

INTRODUCTION

Real Party in Interest, Vanessa T. (Vanessa) brought this action against petitioner Sun Lounge Tanning Centers (Sun Lounge) and its former employee, Adam Bronson.

Vanessa alleged that Bronson surreptitiously viewed her while she lay naked in a tanning booth. Vanessa claimed that Sun Lounge was liable for Bronson's conduct under the doctrine of respondeat superior and pursuant to a premises liability theory. Sun Lounge filed this petition for writ relief after the trial court denied its motion for summary judgment and/or summary adjudication of Vanessa's claims.[1]

In its petition, Sun Lounge contends that Bronson was not acting within the scope of his employment when he spied on Vanessa and therefore, that Sun Lounge cannot be liable for Bronson's actions pursuant to the doctrine of respondeat superior. Sun Lounge also contends that Vanessa's premises liability claim fails as a matter of law because no dangerous condition existed at the tanning salon.

We conclude Sun Lounge cannot be held vicariously liable for Bronson's conduct under the respondeat superior doctrine because Bronson was not acting within the scope of his employment when he surreptitiously viewed Vanessa. We also conclude that Vanessa's premises liability claim fails as a matter of law because Sun Lounge did not owe her a duty to prevent Bronson's unforeseeable conduct. Accordingly we grant the petition.

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[1] Vanessa asserts in her brief that Bronson failed to respond to her complaint and that she obtained a default against him. Bronson is not a party to this writ proceeding.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2002, Vanessa went to a tanning salon owned by Sun Lounge. Bronson was the only employee working at the salon that day. After a brief discussion with Bronson at the front desk, Vanessa went into a private tanning room. She put on tanning goggles and disrobed completely. Vanessa then lay down on a tanning bed and closed the top cover of the bed. While lying on the tanning bed, Vanessa heard a noise. She turned her head to the right, removed the tanning goggles, and noticed a shiny object protruding through the doorway to the tanning room. She then pushed the cover of the tanning bed open, removed her goggles, and observed that the shiny object was a compact disc being held in someone's hand. The person holding the compact disc was later determined to be Bronson. Vanessa put on her clothes and left the tanning salon. Bronson pleaded with her not to notify the police of his conduct.

Vanessa went home and reported the incident to the police. That same day, Bronson was cited for annoying/molesting a juvenile, in violation of Penal Code[2] section 647.6, subdivision (a), and looking into a private area, in violation of section 647, subdivision (k). Sun Lounge terminated Bronson's employment that same day as well. In July 2002, Bronson pled guilty to the section 647, subdivision (k) charge.

In April 2003, Vanessa filed a first amended complaint against Bronson and Sun Lounge. The complaint alleged two premises liability causes of action and one

intentional tort cause of action. The two premises liability claims described Bronson's conduct in surreptitiously viewing Vanessa. The first premises liability claim alleged that defendants had been negligent in maintaining, managing, and operating the tanning salon. The second premises liability claim alleged that defendants had willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity on the property. The intentional tort claim repeated the description of Bronson's conduct and alleged that all defendants had intentionally caused damage to Vanessa.

Sun Lounge moved for summary judgment and/or adjudication of each of Vanessa's claims. Vanessa filed an opposition to Sun Lounge's motion. At the hearing on Sun Lounge's motion, Vanessa withdrew the premises liability claim that was premised on a failure to warn. The trial court denied Sun Lounge's motion both as to Vanessa's intentional tort claim and her remaining premises liability claim.

Sun Lounge filed a writ petition in this court in which it claimed the trial court improperly denied its motion for summary judgment and/or adjudication. We issued an order to show cause why the relief requested should not be granted, and stayed further proceedings in the trial court.

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2 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

III.

DISCUSSION

A. Appropriateness of Writ Relief and Standard of Review

Our review of Sun Lounge's petition is governed by the following well established principles.

> "An order denying a motion for summary judgment may be reviewed by way of a petition for a writ of mandate. [Citation.] Where the trial court's denial of a motion for summary judgment will result in a trial on non-actionable claims, a writ of mandate will issue. [Citation.] Since a motion for summary judgment 'involves pure matters of law,' we review a ruling on the motion independently. [Citation.] Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 594-595.)

B. Bronson Was Not Acting Within the Scope of His Employment When He Spied on Vanessa

Sun Lounge claims that Bronson was not acting within the scope of his employment when he spied on Vanessa and that Sun Lounge therefore is not liable for Bronson's intentional tort pursuant to the respondeat superior doctrine. Whether an employee has acted within the scope of employment presents a question of law when, as in this case, "'the facts are undisputed and no conflicting inferences are possible.'" (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299 (*Lisa M.*).)

In *Lisa M., supra,* 12 Cal.4th 291, the California Supreme Court addressed whether a hospital could be liable under the respondeat superior doctrine for its employee's sexual assault of a patient during an ultrasound examination. The court began

its discussion of the doctrine by noting, "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment." (*Id*. at p. 296.) The *Lisa M*. court further specified that, "an employer will not be held liable for an . . . intentional tort that did not have a causal nexus to the employee's work." (*Id*. at p. 297.) In contrast, where an employee's intentional tort is "engendered by the employment," the employer will be liable. (*Id*. at p. 298.)

In determining whether a tort is "engendered by the employment," (*Lisa M., supra,* 12 Cal.4th at p. 298) the *Lisa M*. court instructed:

> "Respondeat superior liability should apply only to the types of injuries that "'as a practical matter are sure to occur in the conduct of the employer's enterprise."' [Citation.] The employment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." (*Id.* at p. 299.)

Applying these principles, the *Lisa M.* court explained why, as a matter of law, the hospital could not be held vicariously liable for its employee's sexual tort:

> "[A] sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions. Here the opposite was true: a technician simply took advantage of solitude with a naive patient to commit an assault for reasons unrelated to his work. [The employee's] job was to perform a diagnostic examination and record the results. The task provided no occasion for a work-related dispute or any other work-related emotional involvement with the patient. The technician's decision to engage in conscious exploitation of the patient did not *arise out of* the performance of the examination, although the circumstances of the examination made it possible. 'If . . . the assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and lust, there should be no liability.' [Citation.] . . . . [¶] [The employee's]

> criminal actions were, of course, unauthorized by Hospital and were not motivated by any desire to serve Hospital's interests. Beyond that, however, his motivating emotions were not causally attributable to his employment. The flaw in plaintiff's case for Hospital's respondeat superior liability is not so much that [the employee's] actions were personally motivated, but that those personal motivations were not generated by or an outgrowth of workplace responsibilities, conditions or events." (*Id*. at pp. 301-302.)

The holding in *Lisa M., supra,* 12 Cal.4th 291, is consistent with "several decisions [that] have addressed whether an employee's sexual misconduct directed toward a third party is within the scope of employment for respondeat superior purposes." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1006 (*Farmers*).) The *Farmers* court noted that:

> "Those cases hold that, except where sexual misconduct by on-duty police officers against members of the public is involved [citations], the employer is not vicariously liable to the third party for such misconduct (e.g., *Jeffrey E.* [*v. Central Baptist Church* (1988)] 197 Cal.App.3d 718 [church not liable for repeated acts of sexual assault on minor by Sunday school teacher]; *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453 [Roman Catholic archbishop not liable for seduction of parishioner by priests]; *Alma W*. [*v. Oakland Unified School Dist.* (1981)] 123 Cal.App.3d 133 [school district not liable for janitor's rape of student]). In those decisions, vicarious liability was rejected as a matter of law because it could not be demonstrated that the various acts of sexual misconduct arose from the conduct of the respective enterprises. In particular, the acts had been undertaken solely for the employees' personal gratification and had no purpose connected to the employment. Moreover, the acts had not been engendered by events or conditions relating to any employment duties or tasks; nor had they been necessary to the employees' comfort, convenience, health, or welfare while at work." (*Farmers*, *supra*, 11 Cal.4th at pp. 1006-1007.)

In this case, Bronson used a reflective compact disc to view Vanessa while she lay nude in the tanning booth. Bronson's job duties at the salon included administering the

front desk area, cleaning the tanning rooms after their use, and cleaning towels and other products used in the tanning rooms. Bronson's decision to surreptitiously view Vanessa clearly did not arise out of his duties at the salon. Further, workplace conditions at a tanning salon do not ordinarily give rise to "intense emotions," that might "provoke or encourage" sexual behavior. (*Lisa M., supra,* 12 Cal.4th at p. 303.) Rather, as in *Lisa M.*, the circumstances of Bronson's employment merely provided him the opportunity to commit the tort "for reasons unrelated to his work." (*Id*. at p. 301.) Because Bronson's "motivating emotions," were not "fairly attributable to work-related events or conditions," his sexual misconduct was not within the scope of his employment. (*Ibid*.; accord *Farmers*, *supra*, 11 Cal.4th at p. 1006.) Accordingly, we conclude Sun Lounge cannot be held liable for Bronson's actions under the respondeat superior doctrine.

Vanessa argues that Bronson's conduct was incidental to his employment, noting that Bronson was required to interact with patrons and take care of the room where the incident occurred. She also points out that tanning salons cater to patrons who completely disrobe to achieve the best tanning results. However, in *Lisa M*., the employee was required to interact with patients and attend to them at the place where the incident occurred, and the victim was required to push "her shorts down to expose the area to be examined." (*Lisa M., supra,* 12 Cal.4th at p. 295.) Further, the employee in *Lisa M*. was required to have physical contact with the victim in order to complete the ultrasound examination. (*Ibid*.) Yet, the Supreme Court held that the employee had acted outside the scope of his employment when he sexually assaulted the victim. (*Id*. at

pp. 301-302.) Similarly, Bronson's surreptitious viewing of Vanessa was not incidental to his employment.

Vanessa also argues that Bronson's conduct was foreseeable. She relies on the fact that Sun Lounge acknowledged in its motion for summary judgment that it attempted to design the salon in such a manner so as to prevent people from secretly viewing tanning patrons. Vanessa contends that it is "not beyond the realm of reasonable human experience," to think that an unsupervised young male employee such as Bronson would attempt to view young and attractive women who would be disrobing inside the tanning booths.

This argument fails because it is premised on the foreseeability test necessary to establish a direct negligence claim rather than the foreseeability test necessary to establish a vicarious liability claim under the doctrine of respondeat superior. The court in *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 618-619 (*Rodgers*) explained the distinction:

> "One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for *respondeat superior* merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer. [Citation.]"

The Supreme Court in *Lisa M*. embraced the "*Rodgers* foreseeability test," noting that the test "is useful 'because it reflects the central justification for respondeat superior [liability]: that losses fairly attributable to an enterprise - those which foreseeably result from the conduct of the enterprise - should be allocated to the enterprise as a cost of doing business.'" (*Lisa M*., *supra*, 12 Cal.4th at p. 299, quoting *Farmers*, *supra*, 11 Cal.4th at p. 1004.)

In this case, the fact that Sun Lounge took precautions to prevent the surreptitious viewing of its patrons does not mean that such aberrational conduct by an employee can be regarded as "typical of or broadly incidental" to the tanning salon business. (*Rodgers, supra,* 50 Cal.App.3d at p. 619.) Accordingly, we reject Vanessa's argument that Sun Lounge is liable under the doctrine of respondeat superior because Bronson's conduct was foreseeable.

Vanessa claims that the *Lisa M*. decision is inapplicable because this case does not involve a "'sexual tort' in the same sense as . . . *Lisa M*." Vanessa notes that the employee in *Lisa M.* committed a felony sexual assault while Bronson pled guilty to a misdemeanor offense that did not require proof of sexual misconduct. Yet, the fact that Bronson pled guilty to an offense that did not require proof of sexual misconduct does not mean he did not commit a sexual tort. On the contrary, Bronson's conduct in spying on a nude woman in a tanning booth was a "sexual tort" as that term is used in *Lisa M*. (*Lisa M., supra,* 12 Cal.4th at pp. 301-302.) The fact that Bronson's conduct was less serious than the conduct of the hospital employee in *Lisa M*. does not affect our determination that Bronson's conduct was not within the scope of his employment.

We reject Vanessa's argument that the three public policy objectives outlined in *Lisa M.*—(1) preventing future injuries, (2) assuring compensation to victims, and (3) spreading the losses caused by an enterprise equitably—provide a basis for subjecting Sun Lounge to potential respondeat superior liability. (*Lisa M., supra*, 12 Cal.4th at p. 304.) With regard to the first goal, while perhaps greater precautionary procedures could be implemented to prevent conduct such as Bronson's from occurring in the future, we are far from certain that the costs of such procedures would be justified. Similarly, while "imposing vicarious liability is likely to provide additional compensation to some victims . . . the consequential costs of ensuring compensation in this manner are unclear." (*Id.* at p. 305.) Finally, as the *Lisa M.* court explained, the third rationale is akin to asking "whether the employee's conduct was 'so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.'" (*Ibid.*, quoting *Rodgers, supra,* 50 Cal.App.3d at p. 619.) For the reasons already discussed, we conclude that conduct such as Bronson's should not be deemed a cost of running a tanning salon.

C. The Premises Liability Claim Fails as a Matter of Law Because Sun Lounge Did Not Owe Vanessa a Duty to Prevent Bronson's Conduct

Sun Lounge maintains that Vanessa's premises liability claim fails as a matter of law. We agree.

In order to state a premises liability claim sounding in negligence, Vanessa must show that Sun Lounge owed her a legal duty. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*), disapproved on another ground in *Aguilar v. Atlantic*

Richfield Co. (2001) 25 Cal.4th 826, 853, fn. 19.) "The existence of a duty is a question of law for the court. [Citations.] Likewise, '[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court.' [Citation.]" (*Ibid*.)

Our Supreme Court has outlined the scope of a business owner's duty to prevent criminal acts against its patrons. In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M*.), an employee of a photo store located in a shopping center who was raped while at work sued the owner of the shopping center. The employee claimed that the owner's failure to provide security patrols constituted negligence. The *Ann M.* court began its analysis by noting:

> "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord,[3] this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties." (*Ann M., supra,* 6 Cal.4th at p. 674.)

Therefore, the *Ann M.* court noted that the question in that case was "whether [the owner] had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises unless it provided security patrols in the common areas." (*Ann M.,* 6 Cal.4th at p. 676.) The *Ann M*. court stressed that the "duty to take affirmative action to control the wrongful acts of a third party will be imposed only

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3 *Ann M*. and its progeny have been applied in considering the scope of a *commercial landowner's* duty to its patrons to prevent the foreseeable criminal conduct of

where such conduct can be reasonably anticipated." (*Ibid*.) In concluding that the owner did not owe the employee a duty to provide security patrols, the court held:

> "[W]e conclude that a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state." (*Ann M*., *supra*, 6 Cal.4th at p. 679, fn. omitted.)

Similarly, in *Sharon P*., the Supreme Court considered "whether a sexual assault by a third party in the tenant garage was sufficiently foreseeable to support a requirement that defendants secure that area against such crime." (*Sharon P.*, *supra*, 21 Cal.4th at p. 1188.) The *Sharon P*. court rejected the plaintiff's argument that a parking garage is an "inherently dangerous" place sufficient to support imposing premises liability against the owners for the third party's sexual assault. (*Id.* at p. 1194.) The court reasoned, "Were we to find that the occurrence of violent crime in commercial underground parking structures is highly foreseeable as a matter of law, we would be opening the door to virtually limitless litigation over what other types of property could also be characterized as 'inherently dangerous.'" (*Ibid*.) The *Sharon P.* court also concluded that the plaintiff had failed "to establish forseeability," given the absence of "any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that

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third parties. (See *Hassoon v. Shamieh* (2001) 89 Cal.App.4th 1191, 1195-1196 [concluding store owner owed no duty to its patron who was shot while inside store].)

location . . . ." (*Id*. at p. 1199.) Accordingly, the court concluded that the defendant owner was entitled to summary judgment.

In *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 12 Cal.Rptr.3d 615, the California Supreme Court recently applied *Ann M., supra,* 6 Cal.4th 666 and *Sharon P., supra,* 21 Cal.4th 1181, in concluding that a child care center and its property owner could not be held liable for a third party's action in driving his car through a fence bordering the center, killing two children and injuring several others. The Supreme Court emphasized that a heightened degree of foreseeability is required before a landowner may be held liable for the criminal conduct of third parties:

> "[C]ourts look to a higher level of foreseeability of crime in a particular location, as might be indicated by prior similar incidents. (*Robison* [*v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1301].) [¶] In noting that *Ann M.* was based on a criminal act, *Robison* acknowledged that our cases analyze third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties. (*Robison, supra,* 64 Cal.App.4th at p. 1301.) There are two reasons for this: first, it is difficult if not impossible in today's society to predict when a criminal might strike. Also, if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Wiener, supra,* 32 Cal.4th at p. ___, 12 Cal.Rptr.3d at p. 623.)

In this case, there had been no similar incidents at the salon, and there were no other indications of a risk that patrons would be secretly viewed. Further, there is nothing "inherently dangerous," about operating a tanning salon that would lead us to conclude that Bronson's conduct was "highly foreseeable as a matter of law." (*Sharon P., supra,* 21 Cal.4th at p. 1194.) We also reject Vanessa's argument that the fact that Sun

Lounge designed its salon in a manner to prevent such conduct establishes that it had a duty to adopt additional safety precautions beyond those implemented. (Cf. *Riley v. Marcus* (1981) 125 Cal.App.3d 103, 109-110, disapproved on another ground by *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125 ["a landlord's efforts to make his premises more secure against criminal activity should not be greeted by a pronouncement that if such efforts are later found to be inadequate he will incur a liability which would have been nonexistent had he done nothing."])

Vanessa has failed to establish that Sun Lounge had reasonable cause to anticipate that its patrons would be secretly viewed unless Sun Lounge were to provide additional safety precautions. Accordingly, we conclude that Sun Lounge owed Vanessa no legal duty to prevent Bronson's conduct.

IV.

CONCLUSION

Bronson was not acting within the scope of his employment when he spied on Vanessa. Therefore, Sun Lounge cannot be held liable for Bronson's intentional tort under the doctrine of respondeat superior. Vanessa's premises liability claim fails as a matter of law because Sun Lounge did not owe her a duty to prevent Bronson's conduct. Accordingly, Sun Lounge is entitled to summary judgment.

V.

DISPOSITION

Let a writ of mandate issue ordering the superior court to: (1) vacate its order denying Sun Lounge's motion for summary judgment, and (2) enter a new order granting

Sun Lounge's motion for summary judgment. The stay issued by this court on January 28, 2004, is vacated. Sun Lounge is entitled to recover its costs in this writ proceeding.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.